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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Supreme Court, U.S.
FILED
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E. ROBERT SEAVER, CLERK

JOHN THOMAS ANDERSON,
Petitioner,

versus

THE PEOPLE OF THE STATE OF COLORADO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

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February 16, 1972

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NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1972

JOHN THOMAS ANDERSON,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF COLORADO

PETITIONER prays for the issuance of a Writ of Certiorari to review the judgment of the Supreme Court of the State of Colorado entered in the above case on November 22, 1971.

OPINIONS BELOW

The trial court rendered a written opinion denying the Petitioner's motion for a new trial (and rejecting the Petitioner's claims which form the basis of this application) on February 21, 1968. This final Order of the trial court is appended hereto at pages 11 to 21 of the Appendix.

The opinion of the Colorado Supreme Court upholding the disposition made by the trial court of the Petitioner's contentions was handed down on November 1, 1971, and modified on November 22, 1971. The opinion of the Colorado Supreme Court has not yet been officially reported. The unofficial report is found at 490 P2d 47 (1971). This opinion is appended to this Petition in the Appendix at pages 23 to 48.

JURISDICTION

The judgment of the Colorado Supreme Court entered on November 22, 1971, was stayed for sixty days on November 24, 1971, and until February 7, 1972, on January 24, 1972. A copy of the opinion, of the judgment, and of the stays above referred to are appended to this Petition in the Appendix at pages 11 to 52.

The opinion which was first handed down on November 1, 1971, was modified on November 22, 1971, upon the Petitioner's filing of a motion for a rehearing.

Jurisdiction is invoked under the terms of 28 USC 1257(3).

The questions presented for review are:

1. Is the right to a public trial guaranteed in the Sixth Amendment to the Federal Constitution binding upon the states?

2. Was the Petitioner denied his right to a public trial when his father, his brother and his friends were denied access to the courtroom during the selection of the jury?

3. When no express order directing the exclusion of witnesses from the courtroom during jury selection is made by the trial court and communicated to the accused or his counsel, and the record nowhere shows that the accused or his attorney were aware that close relatives and friends of the Defendant were being excluded from the courtroom, is it constitutionally permissible to infer a waiver of the accused's right to a public trial from his failure to object to the exclusion?

CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULES AND REGULATIONS INVOLVED

The pertinent portions of the Sixth and Fourteenth Amendments to the United States Constitution are set forth in the Appendix at page 53.

STATEMENT OF THE CASE

The Petitioner was charged in the District Court in and for the City and County of Denver, Colorado, with having violated the terms of Colo. Rev. Stat., 1963, 40-5-1 (aggravated robbery). The Petitioner entered a plea of not guilty to the charge and sometime thereafter, a trial to a jury was held. On October 9, 1967, at the conclusion of the trial, the jury returned a guilty verdict.

On October 18, 1968, the Petitioner filed a motion for directed verdict of acquittal notwithstanding the jury's verdict, or, in the alternative, for a new trial. On November 15, 1968, and while that motion was pending, Petitioner's trial counsel learned that during the selection of

the jury the Petitioner's father, brother and friends had been excluded from the courtroom. Immediately thereafter trial counsel applied for and was granted leave to file an amended and supplemental motion raising the issue of the Petitioner's right to a public trial. This motion was filed with the court on December 20, 1967, and is supported by the affidavits of the Petitioner's father, brother and two friends.

The amended and supplemental motion set forth in substance that the Petitioner was denied his right to a public trial because during the selection of the jury, the Petitioner's father, brother and friends were excluded by the bailiff from the courtroom. These allegations were supported by the affidavits of the persons excluded. In addition thereto, the affidavit of the Petitioner's brother states that Virginia E. Thomas, one of the jurors who served in the trial below had been known to him for a period of three years, that the Petitioner's brother had a dislike for her, that he had the impression that Mrs. Thomas had a dislike for him, and that his attitude towards Mrs. Thomas was not a pleasant one. The affidavit further states that had the Petitioner's brother been aware that Mrs. Thomas was in the jury panel, he would have notified the Defendant's counsel of his impressions concerning Mrs. Thomas and of his attitude towards her. The prosecution then filed counter-affidavits. The affidavit of the bailiff, Edward R. Walsh, in substance admits that because of the limited seating capacity of the courtroom where the trial was held, it had been the court's general policy to segregate the prospective jurors from witnesses and spectators and that, pursuant to that policy,

it had been the procedure in the court below to exclude witnesses and spectators from the courtroom during the selection of the jury. The bailiff added that these considerations dictated the exclusion by him of the father, brother and two friends of the Defendant until the selection of the jury in the case below was completed. According to the bailiff, "to the best of his recollection," immediately prior to the selection of the jury, he advised the Defendant's counsel about the practice of the court to exclude, where necessary, all but officers of the court, counsel, Defendant, sheriff's officers and the jury panel. Further, the bailiff stated his belief that the location of the Petitioner and his counsel in the courtroom during jury selection was such that they must have been aware of the exclusion of spectators.

It is clear, however, that no exclusionary order was entered of record by the court and that the trial judge at no time informed counsel for the Petitioner or the Petitioner of the exclusionary rule apparently prevailing at the time.

Further affidavits filed by the Defendant's counsel disclose unequivocably that at no time did the bailiff ever communicate to counsel that it was the practice of the court to exclude anyone from the courtroom, that at no time was he aware of the fact that anyone had been excluded from the courtroom during the selection of the jury, and that counsel's knowledge of the exclusion of Petitioner's relatives and friends came to him on November 15, 1967.

The trial court held no evidentiary hearing to resolve the factual conflict between the bailiff's

and counsel's affidavits, but heard oral arguments on the amended and supplemental motion. The trial court thereafter issued a written opinion on February 21, 1968, a copy of which appears in the Appendix at pages 11 to 21, acknowledging that in fact the Petitioner's father, brother and two friends had been excluded from the courtroom during jury selection to avoid their coming in contact with prospective jurors, but stating that "it had been obvious to the Defendant and his attorney that the Defendant's relatives were not in the courtroom" during jury selection. The trial court further stated in its opinion that because no objection was interposed by the Defendant, it was not alerted to the fact that a problem existed and did not therefore take any steps to correct it. Concluding that no prejudice was shown by the Defendant arising out of the exclusion of his relatives and friends from the courtroom during jury selection, the trial court denied the amended and supplemental motion for a new trial.

Thereafter, on April 1, 1968, the Defendant was sentenced to confinement at hard labor for a period of not less than seven years nor more than fourteen years.

On his appeal to the Colorado Supreme Court, the Petitioner raised but one issue, namely, the denial of his rights to a public trial. The Colorado Attorney General conceded the application of the public trial provisions of the Sixth Amendment to the United States Constitution to state criminal proceedings, and conceded further that the right to a public trial extends and applies to the jury selection proceedings. The Colorado

Supreme Court in its opinion rejected the Petitioner's claims and held that because of the size of the courtroom in which the case was tried, the exclusionary practice carried out by the bailiff was entirely proper and the failure of the Petitioner to object amounts to a waiver of his right to a public trial because the physical characteristics of the courtroom made it virtually impossible for the bailiff's actions to go unnoticed.

REASONS FOR GRANTING THE WRIT

The Petition for a Writ of Certiorari to review the judgment of the Colorado Supreme Court and the reversal of the judgment rendered by that court should be granted because this case presents two federal issues of substance, namely, the right to a public trial in state criminal proceedings under the United States Constitution and what constitutes a waiver of that right.

1. The Right to a Public Trial. This Court has not squarely ruled upon the application of the public trial provisions of the Sixth Amendment to the United States Constitution to state criminal prosecutions through the Fourteenth Amendment to the Federal Constitution or otherwise. However, other rulings of this Court have imposed the protection of other rights guaranteed by the Sixth Amendment to state prosecution. See Gideon vs. Wainwright, 372 US 235 (1963)--right to counsel; Pointer vs. State of Texas, 380 US 400 (1965)--accused's right to confront the witness.

Lower federal courts have treated the Sixth Amendment's right to a public trial as binding

upon the states. See, for example, Lewis vs. Peyton, 352 F2d 791 (4 Cir. 1965); United States vs. Herold, 246 Fed. Supp. 363 (D. C., N. Y. 1965). Moreover, in his brief in the Colorado Supreme Court, the Colorado Attorney General conceded the application of the public trial provisions of the Sixth Amendment to state criminal proceedings. Its extension and application to the issue raised by the Petitioner were also conceded by the Colorado Supreme Court in its opinion. See, Anderson vs. People of Colorado, 490 P2d 47 (1971).

The application of the Sixth Amendment's right to a public trial to state criminal proceedings is such an important constitutional question as to require a definitive pronouncement from this Court. Moreover, the second question presented for review requires as a prerequisite to its resolution, a determination as to whether or not that portion of the Sixth Amendment concerning an accused's right to a public trial is binding upon the states.

2. The Waiver on the Right to a Public Trial. Assuming the applicability of the Sixth Amendment public trial provisions to state criminal prosecutions, the determination made by the Colorado Supreme Court that the Petitioner, by his failure to object, waived his right to a public trial is, in the light of the facts involved here and of previous decisions of this Court concerning the waiver of federally guaranteed rights, one that does not accord with applicable decisions of this Court.

It is clear from the record that the trial judge did not announce his policy of excluding all

spectators from the courtroom during the selection of the jury through the Petitioner or his counsel. No exclusionary order appears of record. If a dispute exists concerning failure of the Court to impart knowledge of the exclusionary policy through a Petitioner or his counsel, it arises from the fact that bailiff in his affidavit states that to the best of his recollection he told counsel the trial court's exclusionary policy, while, on the other hand, trial counsel has stated, in his affidavit, that the bailiff did not make the claimed communication to him. The trial court held no evidentiary hearing to resolve this factual dispute.

The other ground in support of the waiver set forth by both the trial court and the Colorado Supreme Court is to the effect that because of the small size of the courtroom, it should have been apparent to the Petitioner and his counsel that spectators were being excluded. The reasoning is that under those circumstances, the failure of the Petitioner to object to the exclusion of his relatives and friends from the courtroom amounts to a waiver, or, in other terms, that by his silence, the Petitioner waived his right to a public trial even though the only evidence in the record is to the effect that counsel and the Petitioner did not learn of the exclusion until almost a month after the conclusion of the trial.

Review of this determination by the Colorado Supreme Court is proper because it does not accord with prior decisions of this Court. For example, in Johnson vs. Zerbst, 304 US 158 (1938), this Court announced the principle that an intentional relinquishment of fundamental constitutional

rights is not presumed and that courts should indulge in every reasonable presumption against such a waiver. Carnley vs. Cochran, 396 US 506 (1962), makes it clear that from a silent record it is impermissible to infer a waiver unless evidence shows an intentional and understanding rejection by the accused of the constitutional right involved. Ohio Bell Telephone Co. vs. Public Utilities Commission, 301 US 292, 307 (1937), establishes that in the absence of a warning by the court as to the action it will take, there cannot be consent to such action by a litigant.

In summary, the Colorado Supreme Court, instead of indulging every reasonable presumption against the waiver of Petitioner's right to a public trial as required by the cited cases, did precisely the opposite and presumed acquiescence in its loss.

CONCLUSION

The judgment below should be reversed because it denies to the Petitioner a federally guaranteed right in violation of express language in the United States Constitution and of decisions previously announced by this Court. It is for these reasons the Petition for a Writ of Certiorari to review the judgment of the Colorado Supreme Court on November 22, 1971, should be granted.

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APPENDIX A

IN THE DISTRICT COURT
IN AND FOR THE CITY AND COUNTY OF
DENVER AND STATE OF COLORADO

Criminal Action No. 54459

THE PEOPLE OF THE STATE OF COLORADO,	) In the Matter of Defendant's: (1) "Motion for Directed Verdict of Acquittal Notwithstanding the Jury's Verdict or in the Alternative Granting the Defendant a New Trial" as Filed October 18, 1967; (2) "Amended and Supplemental Motion for a Directed Verdict of Acquittal Notwithstanding the Jury's Verdict or in the Alternative Granting to the Defendant a New Trial" as Filed December 20, 1967.
vs.	
JOHN THOMAS ANDERSON,	
Defendant.	

At the outset it should be noted that, based on official records and the Court's own personal notes made during the trial, the following events occurred during the indicated portions of the trial and proceedings subsequent thereto.

Trial began Monday afternoon, October 2, 1967 and was completed Friday morning, October 6, 1967, with the jury retiring to commence deliberations at 11:57 a.m. on said date. Actual

selection of the jury had commenced at 1:30 p.m. Monday, October 2, 1967, and was completed by mid-morning Tuesday, October 3, 1967. Upon administration of the oath to the trial jury at 10:42 a.m. on October 3, a short recess was declared and trial resumed at 11:00 a.m. that same morning.

The jury, with the exception of time out for the luncheon and dinner periods, deliberated throughout the afternoon and evening hours of October 6 and resumed deliberations the next morning, Saturday, October 7, 1967. Upon reaching agreement early that same morning and pursuant to agreement of the attorneys of record and the defendant himself, the verdict was sealed and opened by the Court Monday, October 9, 1967, with all jurors, the defendant and his attorney, the District Attorney, and court personnel present for the reading of such verdict by the Court. The verdict rendered by the jury was "guilty" of armed robbery as charged in the Information.

In due course, defendant's initial motion for directed verdict of acquittal notwithstanding the jury's verdict or in the alternative granting the defendant a new trial was filed October 18, 1967 and this motion was scheduled for hearing on November 17, 1967. Two days before the date on which defendant's initial motion was to be heard, the defendant's brother, Paul Albert Anderson, for the very first time, mentioned to defendant's attorney, Mr. Diamond, the matters which it is now claimed entitle the defendant to a new trial. (Page 4 and 5 - defendant's brief and pages 1 and 2 Diamond affidavit)

The defendant's initial motion as filed October 18, 1967 contained five alleged claims of error. Thereafter counsel for the defendant,

upon proper application, was granted leave to file an amended and supplemental motion. Subsequently, on Wednesday, December 20, 1967, and pursuant to such authorization, the defendant filed his amended and supplemental motion and attached thereto four affidavits and filed at the same time his opening brief in support of said motion. Because of the new filing, the hearing previously scheduled for November 17, 1967 to consider defendant's original motion necessarily had to be vacated and the original and supplemental motions were subsequently scheduled for hearing February 16, 1968 with the prosecution to file an answer brief in reply to defendant's opening brief and defendant to file reply brief if desired. An answer brief was filed by the People on January 22, 1968. Though defendant and his attorney did file individual affidavits thereafter, no reply brief has been submitted by the defendant.

In the supplemental motion the defendant added to the claims previously asserted in the initial motion a claim of error based upon the contention that defendant's brother, Paul Albert Anderson, and defendant's father, Charles Thomas Anderson, as well as two young friends of the defendant, were excluded from the courtroom during selection of the jury and that therefore the defendant was deprived of a public trial as required by law. The defendant has attached to his supplemental motion affidavits executed by the defendant's father, Charles Thomas Anderson, and brother, Paul Albert Anderson, and by two young friends, George Perry Stamison and James William Burg.

The People have filed counter-affidavits, one by Mrs. Virginia E. Thomas, who occupied jury seat No. 6 at trial of the case, and is the juror mentioned in defendant's supplemental motion,

and one filed by Edward Walsh, the duly appointed bailiff of Division No. 11 of the Denver District Court. Subsequently, and on February 1, 1968, affidavits were filed by the defendant and by his attorney, Chris J. Diamond.

As to Paragraphs (a), (b), and (d) of defendant's initial motion, suffice it to say that there was testimony and evidence developed at the trial which, if believed by the jury (and it obviously was believed) was ample and more than sufficient to support the jury's finding of guilt. With respect to the question raised as to credibility of witnesses, it was the function of the jury to apply the tests of credibility as specified in the Instructions and determine whether the testimony of the witnesses was believable or not. Furthermore, the matters raised in Paragraphs (d) and (e) of defendant's initial motion were raised by the defendant and considered and ruled upon by the Court at time of trial and the Court believes the rulings then made were proper and in accordance with applicable procedures and law. Therefore, the initial motion as filed October 18, 1967, should be, and hereby is, denied.

The claim asserted by the defendant in his amended and supplemental motion, because of the serious and unusual contention raised therein, caused the Court to require written briefs from the People and defendant supported, if possible, by pertinent affidavits and the Court in addition agreed to permit oral argument as well. At the conclusion of the oral argument conducted February 16, 1968, the Court orally denied both motions but stated it would explain in writing the reasons for said ruling.

The briefs, together with the affidavits filed by the People and defendant herein, as well as

the authorities cited by counsel; have now been reviewed and the Court has considered also the statements and arguments of counsel at the hearing and the Court in addition having reviewed its own personal notes made during the trial and now being advised in the premises rules as to defendant's amended and supplemental motion as follows:

The basic question involved in the supplemental motion is whether or not the exclusion of the brother, father, and two young friends of the defendant during the jury selection stage infringed upon the right of the defendant to a full, fair, and public trial and in particular whether such exclusion under the circumstances here resulted in prejudice to the defendant. It is conceded in the defendant's opening brief that the brother and father of the defendant were admitted to the courtroom before trial actually commenced and were free to enter the courtroom immediately following selection and swearing of the trial jury which occurred at 10:42 a.m. Tuesday, October 3, 1967. It is a fact conceded by this Court that during voir dire examination and selection of the jury the defendant's father, brother, and two young friends, along with other non-participants, were not allowed in the courtroom for the reasons indicated below. In that regard, the Court had not only the right but the affirmative duty to take whatever precautions were necessary to see to it that none of the witnesses, relatives, or other individuals were permitted to talk to or mingle with the prospective jurors, or to be in such close proximity to such potential jurors as to risk prejudicial statements or conversations in their presence and hearing which might conceivably be overheard by the prospective jurors and thus adversely affect the orderly course of the trial.

In the particular courtroom in which this trial occurred (Division No. 11, Denver District Court), the spectators section seats 24 average-size persons. Directly in front of the railing, separating the spectators section from the trial arena, are 10 additional seats ordinarily reserved for attorneys and the news media. At the start of this trial the bailiffs escorted approximately 35 prospective jurors into the courtroom, seating 24 in the spectators section and the balance in front of the railing. Obviously, in view of the limited seating capacity of the courtroom, there was no possibility of allowing anyone besides the prospective jurors, the defendant, his attorney, and the court personnel in the courtroom without creating a potentially dangerous situation, which could conceivably, because of possible prejudice to the defendant or to the People, lead to a mistrial, or even worse, a miscarriage of justice, it was essential that only the actual trial participants be allowed in the courtroom until the jury had been selected and sworn and the balance of the prospective jurors excused to return to the central jury room. At that point seats in the spectators section did become available for witnesses, relatives, and the public generally, and as admitted by the defendant, the father and brother, as well as any other interested citizens, were able to enter the courtroom. It thus becomes obvious that the father, brother, and two young friends of the defendant were not permitted in the courtroom during selection of the jury because of the fact that they were relatives and friends but strictly and solely because of the limited seating capacity of the small courtroom and the dangers to a fair trial previously noted.

The defendant now contends in the supplemental motion that had his brother been allowed to be in the courtroom during the jury selection, the brother would have recognized the prospective juror in Seat No. 6, Mrs. Virginia E. Thomas, and theoretically could have advised the defendant or his attorney of the facts which it is now claimed amounted to prejudice to the defendant. However, it should be noted at this point that the father and the brother of the defendant were in a favorable position in the corridor adjacent to the courtroom to see the entire jury panel, including the prospective juror Mrs. Thomas, as the panel entered the courtroom at the beginning of the trial the afternoon of October 2, 1967, and the entire panel could readily be seen by those in the corridor outside the courtroom at each recess and upon adjournment for the day. In addition, as the trial commenced, the defendant and his attorney had a list of prospective jurors available to them, including the name of Mrs. Virginia E. Thomas, and most certainly this list could have been checked with the father and with the brother to see whether they recognized any of those listed. Also, when the brother entered the courtroom after the jury was sworn to try the case and saw the 12 jurors in the jury box, including Mrs. Thomas in Seat No. 6, there was no complaint made by the brother to the defendant or to his attorney or to the Court. In fact, the brother obviously attached so little importance to the matters now claimed as error that nothing was said by him about his "impression that she disliked me" (Page 2, Paul Albert Anderson affidavit) until several weeks after the trial had ended.

It is also significant to note that the defendant was unable to furnish the Court with an affidavit from Mrs. Thomas, the specific juror involved, indicating bias or prejudice on her part, or to offer any other factual evidence that the brother's "impression" had any basis in fact or had resulted in any prejudice whatsoever to the defendant. To the contrary, the People have attached to their answering brief an affidavit from Mrs. Thomas wholly rejecting the idea she was prejudiced against the brother or the defendant because of the fact she had seen defendant's brother at her place of employment on a few scattered occasions over the past three years. Mrs. Thomas denies affirmatively that she was prejudiced against either the defendant or his brother, or that the relationship of the brothers played any part in the exercise of her function as a juror or in her decision and vote in this case. As a matter of fact, nothing has been offered by the defendant to this Court to overcome the juror's affirmative declaration of lack of prejudice.

The basic legal question involved appears to rest upon the question, "What is a public trial?" Obviously that phrase is not designed or intended to include all of the public in any given locality or in any particular courtroom. If that were so, even locations as large as the Denver University Stadium or Denver Coliseum would not be anywhere large enough to hold the spectators. The prime purpose of requiring public trial is to prevent a "star-chamber session" where instead of trial on the merits out in the open, a trial or hearing is scheduled behind closed doors by proceedings where, clothed in secrecy and removed from the light of public scrutiny, a defendant could conceivably be deprived of his undisputed

constitutional right to a fair trial. However, in this case there was no secret hearing--no "star-chamber session." In this enlightened day and age, no Court would dare engage in such tactics. In fact, in this case members of the press had at all times open access to the entire proceedings, including the jury selection phase. In addition to the defendant and his attorney, the prosecuting attorneys the judge and the court personnel there was present, at least at the beginning of jury selection, approximately 35 prospective jurors with the trial held out in the open courtroom. Far from excluding the public, the 35 prospective jurors represented a cross-section of the public, chosen by lot from every walk of life.

In addition to that, during the many hours spent in selecting the jury, and with the courtroom as small as it is, it had to be obvious to the defendant and to his attorney that the defendant's relatives (father and brother) were not in the courtroom. In that regard, though disputed by defendant's attorney in his affidavit, the bailiff of Division 11, Edward Walsh, states in his affidavit that he, to the best of his recollection, advised defendant's attorney prior to the selection of the jury of the practice and procedure of this Court, because of the small courtroom and limited seating capacity, to exclude all but officers of the court, counsel, defendant, custodial sheriffs, and the jury panel during the jury selection stage.

In any event, it is significant to note that no objection was interposed by the defendant because of the failure of defendant's father and brother to appear in the courtroom during the time the jury was being selected. Had there been objection raised in apt time, obviously efforts could then

have been made to transfer the case to another and larger courtroom for trial or reach some other workable solution. There being no objection, the Court was not alerted to the fact that any problem existed in that regard until weeks after the trial itself had been concluded. Certainly had the defendant and his attorney been concerned by the absence of the father and the brother, it was their obligation to inquire of the Court as to the reasons for the exclusion from the courtroom of said relatives. This is recognized in defendant's opening brief in this language: "***Once the defendant is aware of some exclusionary fact, he is under a duty to voice his objection, or it will be deemed that he either requested or consented to it." (Page 23 of defendant's opening brief)

None of the cases cited by counsel in any of the briefs contemplate the exact situation encountered here. The ruling of the Colorado Supreme Court in Thompson v. People, 156 Colorado 416, which has been cited by both counsel in their briefs, quotes with approval a portion of the opinion in United States v. Kobli, 172 Fed. 2d 919. A significant excerpt from that opinion reads as follows:

"After mature consideration we have reached the conclusion *** that the Sixth Amendment *** limits the trial judge to the exclusion of those persons or classes of persons only whose particular exclusion is justified by lack of space or for reasons particularly applicable to them."

In the instant case, the exclusion policy of this trial court was in effect during the jury selection stage only because of "lack of space."

The defendant as the moving party has utterly failed to show that prejudice resulted to him

because of the circumstances surrounding the selection of Mrs. Thomas as a trial juror. This Court believes it had not only the right to exercise discretion in this matter but the definite duty to take the steps it did during the voir dire examination and jury selection stage of the trial. Once again it is pointed out and emphasized that the defendant and his attorney had to know by visual observation, if not by advice from Bailiff Walsh, that the father, the brother, and the two young friends were not in the courtroom at any stage during the time the jury was being selected and that therefore if there was any objection to the established procedure, objection could and should have been made in apt time allowing the Court to take corrective measures if deemed advisable. Finally, it is again pointed out that defendant's brother was so little concerned about the service of Mrs. Thomas as a juror that he made no complaint to anyone or even mention of the matter now claimed as error until 37 days after the trial was over when he casually and finally mentioned the matter to defendant's attorney.

In any event, there has been no showing of prejudice to the defendant under the factual situation existing here and therefore the defendant's amended and supplemental motion as filed December 20, 1967, should be, and hereby is, denied.

Dated at Denver, Colorado this 21st day of February, 1968, nunc pro tunc February 16, 1968.

BY THE COURT:
/s/ Gerald E. McAuliffe
Gerald E. McAuliffe
Judge

APPENDIX B

NO. 23660

JOHN THOMAS ANDERSON,
Plaintiff in Error,
v.
THE PEOPLE OF THE STATE OF COLORADO,
Defendant in Error.

Error to the District Court of the City and County of Denver
Honorable Gerald E. McAuliffe, Judge

EN BANC JUDGMENT AFFIRMED

Jorge E. Castillo,
Attorney for Plaintiff in Error.

Duke W. Dunbar, Attorney General,
John P. Moore, Deputy Attorney General,
James F. Pamp, Assistant Attorney General,
Aurel M. Kelly, Assistant Attorney General,
Attorneys for Defendant in Error.

MR. JUSTICE ERICKSON delivered the Opinion of the Court.

The defendant, John Thomas Anderson, was convicted of the crime of robbery. Thereafter, he filed a timely motion seeking a judgment of acquittal notwithstanding the jury's verdict or, alternatively, a new trial. Approximately one month after the trial was concluded, the defendant's lawyer advised the court that he had just learned that during the time that the jury was

being selected the bailiff had allowed only prospective veniremen to occupy the courtroom and had denied access to the courtroom to the defendant's friends and members of the defendant's family. The court, upon being advised, granted the defendant additional time to file an amended and supplemental motion for relief. The defendant's amended motion alleged that he had been denied a public trial in violation of the United States Constitution and the Constitution of Colorado. In support of the motion, affidavits were submitted which set forth the circumstances underlying the allegations of defense counsel. Affidavits were also submitted in an attempt to establish that the defendant was prejudiced by the bailiff's action. After briefs were filed and argument was heard, the defendant's motions were denied by the court. The defendant then sued out a writ of error to this Court.

It is well established that the accused in a criminal case has the right to a public trial. U.S. Const. amend. VI (Sixth Amendment); Colo. Const. art. II, §§16, 25; Thompson v. People, 156 Colo. 416, 399 P.2d 776 (1965). It is also undisputed that the right to a public trial includes that stage of the proceedings which is devoted to the selection of a jury. United States v. Sorrentino, 175 F.2d 721 (3rd Cir. 1949). The right to a public trial, however, is not absolute. In some instances, the right to a public trial may be subordinated to the higher right and duty of the court to insure that the defendant receives a fair trial. Kirstowsky v. Superior Court, 143 Cal. App. 2d 745, 300 P.2d 163 (1956); United States v. Kobli, 172 F.2d 919 (3rd Cir. 1949).

In this case, the entire spectator section of the courtroom was required to seat the prospective

veniremen. The bailiff's action in restricting access to the courtroom was dictated by the limited space which was available and the court's general policy to segregate prospective jurors from witnesses, relatives and other individuals whose proximity, conversation, or actions might cause the jury to be contaminated to the prejudice of the defendant or the prosecution. In view of the size of the courtroom, the bailiff's action was entirely proper.

If defense counsel, or the defendant, was of the opinion that the courtroom was too small to afford the defendant the right to a public trial, objection should have been made so that the court could have arranged to obtain other courtroom facilities. Defendant's lawyer has asserted that his failure to object or to claim that the defendant was being denied a public trial resulted from the fact that he did not know of the bailiff's action until over a month after the trial was concluded. Yet, the affidavit of the bailiff indicates that defense counsel was informed of the general practice which was used in the selection of the jury prior to the commencement of the voir dire examination. Moreover, recognizing the physical characteristics of the courtroom, it was virtually impossible for the bailiff's action to go unnoticed. Under these circumstances, we believe that any right the defendant may have had to object to the exclusion of the public from the courtroom during the selection of the jury was waived. United States v. Garland, 364 F.2d 487 (2d Cir. 1966); United States v. Cappello, 327 F.2d 378 (2d Cir. 1964); Geise v. United States, 265 F.2d 659 (9th Cir. 1959); United States v. Sorrentino, supra; State v. Schmit, 273 Minn. 78, 139 N.W.2d 800 (1966); People v. Cash, 52 Cal. 2d 841, 345 P.2d 462 (1959);

People v. Blanco, 170 Cal. App. 2d 758, 339 P. 2d 906 (1959); Commonwealth ex rel. Paylor v. Cavell, 185 Pa. Super. 176, 138 A. 2d 246 (1958); People v. Tugwell, 32 Cal. App. 520, 163 P. 508 (1917).

It is apparent in this case that the defendant's motion arose as the result of a guilty verdict and not because of the denial of a constitutional right. Only after the defendant was found guilty did hindsight cause defense counsel to decide that the defendant was denied a public trial. During the selection of the jury, newsmen had continuous access to the courtroom, as did counsel and all others who requested the court grant them the right to be present. Defense counsel was, or should have been, aware of the limitations imposed by the size of the courtroom. No requests for a larger courtroom were made however, and defense counsel did not complain of the denial of the defendant's right to a public trial until long after the jury reached its verdict.

Courts have been justifiably criticized where jury verdicts have been set aside by ingenious arguments which were predicated upon constitutional rights not truly in issue. See Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). In this instance, due regard for the right to a public trial does not require us to disregard our obligation to sustain a jury verdict that has not been proven to have been remotely influenced by the action taken by the bailiff. The defendant was not the victim of any unjust prosecution, and the limited exclusion of the general public at this trial during the time that a jury was chosen cannot be elevated to the constitutional plateau of reversible error to escape the jury's verdict. Commonwealth ex rel. Paylor v.

Cavell, supra. An abstract claim, as an afterthought on appeal, will not support reversal. Levine v. United States, 362 U.S. 610, 80 S.Ct. 1038, 4 L.Ed.2d 989 (1960).

Accordingly, we affirm.

MR. CHIEF JUSTICE PRINGLE not participating.

JOHN B. BARNARD, District Judge,* dissenting.

*District Judge sitting under assignment of the Chief Justice under provisions of article VI, section 5(3) of the Constitution of Colorado.

ANDERSON v. PEOPLE NO. 23660

JOHN B. BARNARD, District Judge, dissenting:

I respectfully dissent.

In view of the position I feel compelled to take by the facts in this matter, and the nature of the right which I feel was clearly violated, some additional facts should be mentioned. After a trial to a jury, and after jury deliberations consuming several hours over two days, October 6 and 7, 1967, a verdict of guilty was reached, which verdict was sealed and opened by the Court and judgment entered thereon on October 9, 1967.

The facility in which the trial was conducted contained only enough seats to permit the prospective jurors to be seated in the courtroom, including the chairs that were available in front of the railing separating the trial area and the area normally available to the public. Thus, there was no space available for any member of the public to be admitted to the courtroom during the jury selection process. According to his affidavit, the bailiff, without specific direction from the Court, but because of the Court's general policy favoring segregation of prospective jurors from witnesses and spectators, excluded

the father and brother and two friends of the defendant from the courtroom during this phase of the trial. No court order of exclusion was made, nor was any objection made to the exclusion of all spectators. After the jury had been selected, spectators were permitted in the courtroom and the brother of the defendant noted that one of the jurors was a person whom he had known and he felt might be prejudiced against him, and by association, against the defendant. According to affidavits filed with the amended motion, these facts were not called to the attention of the defendant nor his attorney until on or about November 15, 1967, following which, the amended motion was filed as recited above.

The trial judge filed a written opinion denying the amended motion for a New Trial or Judgment of Acquittal. In the opinion, the facts are set forth in some detail. The trial judge decided contrary to the contentions of the defendant for three principal reasons:

(1) The defendant's right to a fair trial was protected by insuring that there was no commingling of witnesses, attorneys and other participants with the prospective jury panel, the presence of the prospective jury members themselves as adequate representatives of the "public," and the availability of the courtroom to the press;

(2) That if objection had been timely made, the Court might have made arrangements for a larger facility in which to conduct this portion of the trial, or otherwise remedy the situation; and

(3) That the defendant was not, under the circumstances here, prejudiced by the exclusion.

The question is, in my view, a close one, as the trial court indicated in its opinion, and does present two novel aspects. One is the fact that

the exclusion was not by an express order of the Court but by the action of the bailiff under a general "policy." The other, which is totally novel as far as I am able to determine, is that exclusion of all members of the public was necessitated by a courtroom of such small dimensions that only the prospective panel could be seated.

It is conceded that the jury selection process is part of the trial itself.

The first question for determination is as follows: Where court facilities are so limited physically that no members of the public, as distinguished from prospective jurors and other participants, may be present during the trial of the defendant, has the defendant been denied the right to public trial? In my opinion, this question must be answered in the affirmative. While reasonable limitations resulting from physical facilities must occasionally be imposed as a practical matter, this does not give any branch of government the right to provide or use facilities for criminal trials which, by their very nature, preclude a public trial.

United States v. Kobli, 172 F.2d 919 (3rd Cir. 1949), cited in the opinion of the majority, does not, in my view support the proposition for which it is cited. In that case, the Court discussed the historical basis of the right to a public trial. It concluded that limitations could properly be imposed to protect the young, to preserve order and decorum, to reserve space for those directly connected with the trial, and to exclude "... those persons or classes of persons only whose particular exclusion is justified by lack of space or for reasons particularly applicable to them..." (p. 923). However, on the

point that this does not permit total exclusion, that Court said, also at page 923 and 924:

"Thus it has been suggested that if the members of the public are entitled to be present the right should be accorded to all who desire to attend and not merely to those who by coming early are able to gain admission to the limited number of seats available. The Courts, however, have denied that the constitutional right to a public trial involves the necessity of holding the trial in a place large enough to accommodate all those who desire to attend. Also it has been suggested that the end of publicity sought to be achieved will be accomplished by permitting newspaper reporters to be present as the trial judge in this case did, without the indiscriminate admission of members of the public who may come only out of curiosity. It may well be that in most cases this would be sufficient to insure that acts of judicial misconduct would receive public attention. The law, however, is chary of putting all its eggs in one basket. The apparently idle spectator may turn out to be the one person who directs public attention to acts of judicial oppression which are overlooked by the more seasoned but sometimes blase professional gatherer of news. Moreover, as had been suggested by Professor Wigmore, it is entirely possible that the apparently idle spectator may prove to be the unknown witness vital to the defense of the accused.

"We are satisfied that the framers of the Sixth Amendment believed it to be essential to the preservation of the liberty of the individual that, to the extent and within the

limits which we have indicated, members of the general public should be admitted to every criminal trial even though it might appear that, in a case such as the one before us, most of them come only out of morbid curiosity. . . .

"(9) While, as has been suggested, the right thus accorded to members of the public to be present at a criminal trial as mere spectators may not be wholly logical, it has been imbedded in our Constitution as an important safeguard not only to the accused but to the public generally. Having evolved as a basic right which has withstood the test of the centuries, it hardly needs at this late date the support of the logician. We are in duty bound to preserve the right as it has been handed down to us and this we will do only if we make sure that it is enforced in every criminal case, even in such a sordid case as the one now before us."

If the Court is precluded from denying a substantial portion of the interested public from attending a trial, it seems clear that the legislative or executive authority charged with the duty of providing space for trials cannot accomplish the same end by making the space so limited that none of the public can attend.

In People v. Murray, 50 N. W. 995 (Mich. 1891), it was held that an order limiting attendance to "respectable persons" was improper, and further that the court could not delegate the right to determine who should be admitted to a police officer under the control of the court.

In State v. Hensley, 79 N. E. 462 (Ohio 1906), the trial involved an alleged sexual offense against a female of the age of 14 years. On the

second day of the trial, the trial court transferred the case to a small courtroom, the probate courtroom, and ordered the exclusions of all except the jury, defendant's counsel, members of the bar, newspaper men, and a witness for the defendant. The order was made in open court in the presence and hearing of his counsel. No objection was made other than the statement by one of defendant's counsel that the defense knew of no testimony that would be improper to be heard in a public trial. After discussing the constitutional provision in Ohio, which guaranteed a public trial, the court said as follows at page 463:

> "The term 'public' in its enlarged sense, takes in the entire community, the whole body politic, and a public trial means one which is not limited or restricted to any particular class of the community, but is open to the free observation of all. This does not impose upon the authorities a duty to provide so large a place for public trials as would accommodate every member of the community at the same time, for that would be plainly impractical, but it does import a duty to make reasonable provision in that regard, and this requirement is usually met by ample accommodations for the purpose. And these considerations suggest the duty of courts, when trying persons accused of crime, to avail themselves of the means thus furnished, but suggest, further, that the entire public may not be present at such trial: . . . Assuming that the rule above indicated governs the case, it is manifest that the order of exclusion made by the trial judge was in excess of the power of the court in the premises.

It permitted the admission of a very limited class of the public and excluded all others. Without doubt the object which was sought to be attained was in all respects, save the one indicated above, highly commendable..."

The court went on to give examples of who might properly be excluded, and that the trial judge has broad discretion in that regard, but that the people have the right to know what is being done in their courts. The unduly restrictive exclusionary order, effectuated by a transfer to a smaller courtroom, was held to require a reversal of the conviction.

The interest of the trial court here in preventing the commingling of the prospective jury panel with other participants in the trial and members of the public generally is understandable, and completely proper, it being not an infrequent occurrence that such commingling does result in, as said by the trial court "... a mistrial, or even worse, a miscarriage of justice."

It is also clear from the trial court's opinion that the facility itself left no reasonable alternative except that different facilities might have been procured if objection had been made to the Court. However, the fact is that the defendant did not have a public trial as contemplated by the Constitutions.

The second question is: Did defendant's failure to object constitute a waiver of the right to a public trial?

It should be observed, as it was in the Davis case, infra, that the right to a public trial is not only a right of the defendant - it is a right of the public. Although the defendant is the one whose case is before the Court, it would seem that the public's right could not be waived by the defendant; nor eliminated by the omission of a

governmental agency to provide an adequate facility. The language of the Kobli case, supra, would indicate the existence of a public right, also.

It is usually mentioned in passing that the constitutional right involved is also guaranteed by the Constitution of the State of Colorado, but although the federal cases are more numerous, the right guaranteed by Section 16, Article II of the Constitution of Colorado is the same right as the right to a public trial as contained in the Sixth Amendment to the Constitution of the United States.

Colorado Rules of Procedure, Civil and Criminal, have consistently required that certain proceedings be held in open Court, except where circumstances compel a limitation. It is to be noted that an existing directive of this Court requires that even preliminary hearings must be public hearings unless the Trial Court determines after a hearing, that it is in the best interests of the defendant and the general public that it be a private hearing, and that the defendant consents thereto. CJD No. 6, March 27, 1970. It is not logical to assume that the "public" requirements for trial are less stringent than the "public" requirements for a preliminary hearing. There is no finding by the trial court, nor any indication in the record, that the public interest compelled the conduct of this trial in a facility so small that no portion of the public could attend. To say that the "public" waived its right because the City and County of Denver did not provide an adequate courtroom would be to subject all of the members of the public to a limitation imposed by a governmental subdivision. Just as the defendant could not waive the right of the public, the City and

County of Denver could not waive the right of the public. The question of whether or not the public interest would be better served by a total exclusion of the public must remain a judicial determination, subject to judicial review.

Seemingly contrary to the view that the right to public trial is a right shared by the public to the extent that there can be no waiver thereof by the defendant is United States v. Sorrentino, 175 F.2d 721 (3rd Cir. 1949). Sorrentino was another of the defendants convicted in the trial which resulted in the conviction of the defendant Kobli, whose case is referred to above. Kobli had objected to the exclusionary order and Sorrentino's counsel had expressly stated they did not join in the request of defendant Kobli's counsel and that they had no objection to the order of exclusion. The Court held that the action of Sorrentino's counsel was binding upon him, and that the right to public trial was one which could be waived, and was effectively and affirmatively waived by his attorneys. Although seemingly inconsistent with the concept of the right to public trial as referred to hereinabove, even if Sorrentino does state the law, the opinion of the Court was based on an affirmative waiver. It did not reach the question of whether such a waiver exists where no exclusionary order was entered, and defendant and his counsel contend that they had no knowledge that an exclusionary practice was in effect which excluded all members of the public.

Perhaps the answer lies in the proposition that there is a public right, subject to limitations, but that a violation thereof which only interferes with the wishes of a disinterested member of the public can only be cured by other

available remedies - it does not give the consenting defendant another trial.

In respect to the defendant's right, Kobli, supra, says it cannot be denied over objection, and Sorrentino says it can be waived by affirmative action. In the middle is this case.

In the only case directly on the point of the lack of an objection, the Ohio Supreme Court said:

> "... The right to a public trial is guaranteed... The right cannot be waived by silence any more than the right to be tried by jury where the accusation is a felony and the plea is not guilty...". State v. Hensley, supra, p. 464.

The Sixth Amendment to the Constitution of the United States provides for rights of such a fundamental character that due process of law as contained in the Fourteenth Amendment includes observance of the rights therein guaranteed by the states, Gideon v. Wainright 372 US 335, 83 S. Ct. 792, 9 L. Ed. 2d 799. One of those guarantees is the assistance of counsel, and the United States Supreme Court has specifically held this to be of such fundamental character as to require that it be allowed at all stages of the proceedings. Escobedo v. Illinois, 378 US 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977. Not only must defendant be permitted to have counsel, but no waiver exists unless the accused is first specifically advised of his right to counsel, and to appointed counsel if he could not afford to retain counsel. Miranda v. Arizona, 384 US 436, 86 S. Ct. 1602, 16 L. Ed. 694. Thus, it must be shown that one knows his right before a waiver - an intentional act - exists. It follows that unless one knows a violation of his rights is occurring, he could not knowingly waive them.

In my view, the right to a public trial, subject to reasonable limitations under specific circumstances, is no less fundamental than the right to counsel. Total inadequacy of the facility to permit a public trial is the other end of the spectrum from the requirement that all be permitted to attend who wish to do so. The right lies between those two poles. In the case at bar, the limit of reasonableness was obviously exceeded as no members of the public were admitted except the prospective jurors, who were participants. Hence, the defendant was effectively denied a public trial, even though the Court itself did not so order, and the defendant, being unaware of the condition at the time, did not object. The trial court reasoned that the defendant and his counsel should have known that his relatives were excluded from the circumstances. However, a knowledgeable waiver of a fundamental right cannot be based on an assumption, especially where the attorney, an officer of the Court, unequivocally states that he was not possessed of that knowledge. See Miranda v. Arizona, supra, at page 720 of the Lawyers Edition and pages 468-9 of the official reports.

I believe that the authorities require the conclusion that the right to a public trial is so fundamental that unless there is a showing that there was some overwhelming contrary consideration, or that the interests of justice required a limitation thereon, and the trial judge has therefore imposed a limitation within the area of his reasonable discretion, a trial conducted in violation of the defendant's constitutional right to a public trial without an express waiver shown affirmatively by the record should

not be permitted to stand when the question is properly before the Court on Writ of Error or appeal. There is no waiver by failure to object, at least where the record is silent as to whether the defendant and his attorney knew that interested persons were universally being excluded. That the defendant must have known that his father and brother were being excluded in this matter may be a reasonable inference, but it is also reasonable to infer that the defendant and his attorney were so engrossed in the jury selection process that the possible prejudicial effect of such exclusion did not enter their consciousness. To ground a knowledgeable waiver of this fundamental right upon one of two possible inferences is not constitutionally permissible, in my opinion.

The last question is: Was the error harmless error as comprehended by Rule 52(a), Colorado Rules of Criminal Procedure?

The question should be answered in the negative, in my opinion.

It was suggested that the affidavit of the juror who was recognized by the defendant's brother shows that she was not prejudiced or biased against the defendant's brother, and that, therefore, the error, if any, was harmless.

In Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353, it was held that the defendant waived his right to confront witnesses against him by continued grossly disruptive conduct, after repeated warnings by the Court that such continued conduct would have the result that occurred.

The general basis of Six Amendment rights, although not directly in point on the facts here, and the reason why supposed waivers are not

recognized unless they are clear, is found in the alternatives which can occur if they are eroded by the process of overlooking deprivations thereof in seemingly harmless situations. They are summarized by Mr. Justice Brennan in a concurring opinion in the Allen case, as follows:

> "The safeguards that the Constitution accords to criminal defendants presuppose that government has a sovereign prerogative to put on trial those accused in good faith of violating valid laws. Constitutional power to bring an accused to trial is fundamental to a scheme of 'ordered liberty' and prerequisite to social justice and peace. History has known the breakdown of lawful penal authority - the feud, the vendetta, and the terror of penalties meted out by mobs or roving bands of vigilantes. It has known, too, the perversion of that authority. In some societies the penal arm of the state has reached individual men through secret denunciation followed by summary punishment. . . . The right of a defendant to trial - to trial by jury - has long been cherished by our people as a vital restraint on the penal authority of government. And it has never been doubted that under our constitutional traditions trial in accordance with the Constitution is the proper mode by which government exercises that authority." (emphasis supplied)

In this case, if the defendant's brother had been present and if the identity of this particular juror had been made known to defendant's counsel, the questions purportedly answered in the juror's affidavit could have been explored

on voir dire, and defendant's counsel could have exercised his professional judgment in determining whether or not a preemptory challenge to the juror should be used, even if the Court were to rule against a challenge for cause. However, none of these recognized trial procedures was available to defendant's counsel.

Where the public interest is such as to compel the utilization of facilities which are inadequate to provide basic constitutional guarantees, it is the public that waives its right to try persons accused of crimes. The defendant in such circumstances may well be given the proverbial Tobson's choice: either you go to trial in an inadequate facility or your trial will be postponed until a facility becomes available. Thus, the defendant must waive his right to a public trial or waive his right to a speedy trial, and is compelled to choose between them.

The right to a speedy trial means trial consistent with the Court's business. Gonzales v. People, 156 Colo. 252, 398 P. 2d 236. However, it could not be seriously contended that if no courts were provided, or the number of courts were so grossly inadequate as to extend the time of trial to an unreasonable time, or if the number of courtrooms available for a public trial were so few that defendants who do not wish to waive either their right to a public trial or their right to a speedy trial could be held in custody indefinitely, constitutional requirements are met.

If there are any constitutional rights which are fundamental to due process of law, they are the rights to a speedy trial and to a public trial. While both are subject to the reasonable limitations required by our governmental and social

structure, this cannot be made the basis for a complete denial of those rights, and excuse the denial as harmless.

The closest case on the facts which I could find is rather old, but the principle would seem to be the same today, namely, State v. Brooks, 92 Mo. 542; 5 S. W. 257. In that case, the Court explained the facts and said as follows, at pages 263 and 264 of the Southwestern Reports:

> "It is also objected that defendant did not have a public trial. This claim is based on the fact that, during the early stages of impaneling the jury, two men were stationed, on the afternoon of one day and the forenoon of the next day, at the door of the court-room, who refused to admit any one into the court-room except jurors, witnesses, or officers of the court, or those having business in court. It appears that, when this matter was brought to the attention of the court, the court stated that no order had been made stationing men at said door, and announced that any one who wished to come into the court-room could do so, and made an order that all persons be admitted until all the seats were filled. Had the court either refused to make such an order, or, after making it, had refused a request on the part of defendant that the jurors who had been examined touching their qualifications while the men were stationed at the door should be re-examined, this might have afforded some ground for the complaint made.
>
> Hence, where corrected before the panel was complete and sworn, the error was harmless. Such is not the fact in the case at bar.

The many cases up to its date were summarized and discussed in Davis v. United States, 247 F. 394 (8th Cir., 1917). The Court in that case held that prejudice to the defendant need not be shown where an exclusionary order was entered. The Circuit Court said in that case at page 398 as follows:

> "... A violation of the constitutional right necessarily involves prejudice and more than that need not appear. Furthermore, it would be difficult if not impossible in such cases for a defendant to point to any definite personal injury. To require him to do so would impair or destroy the safeguard."

It has been held in Colorado that prejudice to the defendant need not be shown if, in fact a public trial was denied. Thompson v. People, 156 Colo. 416, 399 P. 2d 776 (1965).

To say that the error was harmless, based upon a subsequent affidavit of the juror whose possible prejudice is the basis for this challenge, would be to make a mockery of the voir dire process and the right of preemptory challenge. The determination of the fairness and impartiality of the jury must be established by the record prior to trial within the limits of the Constitutions and rules of procedure adopted thereunder, and must be accomplished prior to the reception of evidence. There are too many imponderables in respect to the exercise or failure to exercise preemptory challenges to justify holding that the presence of one juror could not have affected the outcome of the trial. Armed with knowledge obtained during the voir dire process, including any information supplied by the defendant or spectators, the attorney has a sufficiently heavy

burden in determining whether to exercise or not to exercise a preemptory challenge, without depriving him of any reasonable, permissible source of information such as that which might be available if the trial, including the jury selection process, were a public trial as is constitutionally required.

I have read the entire transcript in this matter. A recitation of the unusual factual situation disclosed thereby would unduly lengthen this opinion. Suffice it to say that the testimony of the witnesses for the people was not only in conflict directly with the testimony of the defendant, whose presence at the time and place of the alleged robbery was as consistent with his explanation as that of guilt, but was also, in some particulars, inconsistent with the testimony of each other. These were matters for the jury to resolve, and the record discloses that much time was spent by the jury in deliberation. The defendant did not exercise all of his preemptory challenges. Under these circumstances, it is clear that the composition of the jury was extremely important, and that irregularity of a substantial nature in respect to the jury selection could not be said to have been harmless, factually or legally.

There is no way to determine what would have happened if the excluded persons had been present in Court during the jury selection process. Since there was no overwhelming public interest to the contrary, they had a right to be present. To say that the result might have been, or even probably would have been the same, and that the error did not, therefore, substantially harm the interests of the defendant is to engage in judicial hindsight, when the Constitution

requires judicial foresight. The trial judge did not err in making an Order, but it is my view that it was error not to insure that the defendant's trial, and all portions thereof was a public trial, within the meaning of the authorities cited above. Since the error was not called to the trial court's attention until the amended motion for a New Trial was filed, error, in my view, was committed in not granting that motion, as there was no way factually, to determine with reasonable certainty what the consequence would have been if the initial error had not occurred.

If no objection had been made and no request for a new trial had been made, the practical question might be different. However, the matter having been called to the trial court's attention while it was still within the power of the trial court to correct the error by granting a new trial within a few months after the unconstitutional trial, I would hold that the trial court erred in not doing so. The fact that more time has now elapsed, and that prosecution at this time might be difficult does not provide my conscience an escape from the inevitable conclusion that defendant was denied a very substantial right, in violation of the Constitutions of the United States and the State of Colorado. Since it was within the power of the Trial Court to right that wrong, I would hold that it had the duty to do so.

The majority opinion refers to criticism of the overturning of verdicts because of "...ingenious arguments...predicated upon constitutional rights which were not truly in issue..." I assume that these are related, if not identical, positions, except that the doctrine of "harmless error" is a judicially recognized one, while "criticism" of Court's decisions is usually

reserved for later decisions which find flaws in the logic of an earlier decision, and to public criticism of Court decisions which enforce constitutional rights contrary to public opinion at the moment. I am confident that the expression used in the majority opinion refers to judicial criticism of the logic of some of the Supreme Court's decisions during the last decade, perhaps including some of those cited above, as I am certain that my judicial superiors do not believe that public criticism of judicial enforcement of constitutional safeguards is entitled to judicial cognizance in any decision which involves the life or liberty of an individual in the State of Colorado.

The majority opinion cites Chapman v. California, 386 US 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), but it is unclear as to whether it is cited as an example of such a criticized decision, or as criticism of overturning verdicts for insubstantial reasons. If the latter, only the dissenting opinion, by a single Justice, would be such criticism. Seven justices, in that case, concur that the verdict should have been overturned as against the application of the California "harmless error" rule. One Justice would apparently invalidate the harmless error rule where constitutional rights are involved.

The case involved improper comments on the failure of the defendants to testify. The specially concurring opinion, in a footnote, makes reference to the distinction between an improper application of the exclusionary rules based upon unconstitutionality involved in obtaining evidence and a trial in which the jury was unconstitutionally selected, or an unconstitutional instruction given. Applying that

distinction here, the jury was selected in an unconstitutional manner, and the verdict must be overturned regardless of any actual prejudice. Mr. Justice Stewart said, at page 722 of the Lawyers Edition:

> "...In a long line of cases leading up to and including Whitus v Georgia, 385 US 545, 17 L ed 2d 599, 87 S Ct 643, it has never been suggested that reversal of convictions because of purposeful discrimination in the selection of grand and petit jurors turns on any showing of prejudice to the defendant."

I think the rationale of that rule is precisely in point here, and question whether criticism of the application of the exclusionary rule of evidence will ever be sufficient to justify sustaining a verdict by a jury selected in a closed proceeding.

I would agree that there is basis for the judicial "justifiable criticism" of the application of the exclusionary rule which suppresses evidence obtained in violation of certain constitutional provisions. However, though of interest to legal scholars, the argument as to the wisdom of the exclusionary rule is moot. It is the law of the land under United States Supreme Court decisions which, though limited somewhat in recent cases, have not been overruled.

A different question entirely is presented when we deal with the basic procedural requirements of due process of law in criminal trials. These fundamental requirements include notice, an opportunity to be heard by an impartial tribunal, the assistance of counsel, and, I submit, the right to a speedy and public trial. Whether or not the exclusionary rule survives the passage

of time, and reconsideration by the Supreme Court when composed of different justices, remains to be seen. Perhaps the "justifiable criticism" will prevail. However, the right to a public trial is not, in my opinion, subject to any rational criticism and has withstood the test of centuries. When it is lost, by erosion of judicial decision or by "practical" problems of inadequate space provided by "practical" executive or legislative bodies, one of the truly fundamental supports of the concept of individual rights under law will have been sacrificed on the altar of expediency. Our inefficient and cumbersome system may be less so. All that will be lost is a little more of the impractical idealism on which this nation was founded. When the last of that outdated eighteenth century idealism has been submerged in a sea of practicality, the practical advantage to the masses will no longer be impeded by legally protected rights of individuals, and the "last, best hope of mankind" will have quietly passed from our civilization. Perhaps that is over-extending the significance of the trend exhibited by the majority opinion. However, when we qualify the right to a public trial by requiring proof that its denial caused actual prejudice, or was "really an issue," or by giving sanction to an exception where a miniature courtroom was all that was deemed necessary for trial of an armed robbery charge, I think we take a significant step down the path that leads to that inevitable end. As a confirmed idealist in respect to the worth of the individual as opposed to the self-interest of the mass of the privileged, it saddens me. As one sworn to uphold the Constitutions of the United States and the State of

Colorado, I find myself in conflict with the considered views of others with a similar responsibility. It is not from a feeling of intellectual superiority that I express my disagreement, but from a legally trained mind and a morally committed conscience that is individual to me. Although arrayed against it is superior training and experience, and at least equal conscientiousness on the part of the members of this Court, it tells me that the possibility of injustice to this individual defendant is a serious reality, and the cause of "ordered liberty" even more threatened as a result of this decision.

APPENDIX C

STATE OF COLORADO, ss.

In the Supreme Court Thereof.

TO THE PEOPLE OF THE STATE OF COLORADO.

To the District Court of the City and County of Denver and State of Colorado, Greeting:

WHEREAS, lately in the District Court of the City and County of Denver, State aforesaid, in a certain cause therein pending between The People of the State of Colorado, Plaintiff, and John Thomas Anderson, Defendant, the judgment of said District Court in said cause rendered was against the said defendant.

AND WHEREAS, the said cause was brought into our SUPREME COURT OF THE STATE OF COLORADO, by writ of error to said District Court.

AND WHEREAS, at the September Term of our Supreme Court, in the year of our Lord one thousand nine hundred and ~~sixty~~ seventy-one, the said cause came on to be heard before our said SUPREME COURT on the 1st day of November, A. D. 19 71. (the same being one of the Judicial days of said term) and the following proceedings were had and entered of record in said cause, to-wit:

John Thomas Anderson,

Plaintiff in Error,

vs.

The People of the State of Colorado,

Defendant in Error.

No. 23660

Error to the District Court of the City and County of Denver.

(54459)

This cause having been brought to this Court by writ of error to review the judgment of District Court of the City and County of Denver, and having been heretofore argued by counsel and submitted to the consideration and judgment of the Court upon the matters assigned as constituting error in the proceedings and judgment of said District Court, and it now appearing to the Court that there is no error in the proceedings and judgment of said District Court.

It is therefore ordered and adjudged that the judgment of said District Court be, and the same is hereby affirmed, and that it stand in full force and effect; and that this case be remanded to said District Court for such other and further proceedings, according to law, as shall be necessary to the final execution of the judgment of said District Court in the cause, notwithstanding the said writ of error.

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APPENDIX D

IN THE SUPREME COURT OF THE STATE OF COLORADO

JOHN THOMAS ANDERSON, Plaintiff in Error,	)	Error to the
	)	District Court
23660 vs.	)	of the
	)	City and
THE PEOPLE OF THE STATE OF COLORADO, Defendant in Error.	)	County of Denver

Upon consideration of the motion of the plaintiff in error for a stay of proceedings and for a continuation of the $25,000 bond heretofore filed in the trial court, it is this day ordered that a stay of proceedings be granted for a period of sixty days only; said sixty day period to commence this date;

It is further ordered that the $25,000 bond heretofore filed in the trial court be continued pending determination of the application of the plaintiff in error for a Writ of Certiorari from the United States Supreme Court.

BY THE COURT, En Banc, November 24, 1971.

IN THE SUPREME COURT OF THE
STATE OF COLORADO

JOHN THOMAS ANDERSON, Plaintiff in Error,	)	Error to the District Court
23660 vs.	)	In and For the City and
THE PEOPLE OF THE STATE OF COLORADO, Defendant in Error.	)	County of Denver.

Upon consideration of the motion of the Plaintiff in Error for a stay of proceedings pending application for Writ of Certiorari and a motion for further stay from the United States Supreme Court, it is this day ordered that all proceedings herein be stayed to and including February 7, 1972 and that the bond previously filed in the Trial Court be continued pending determination of the application for Writ of Certiorari in the United States Supreme Court.

BY THE COURT, January 24, 1972.

APPENDIX E

CONSTITUTIONAL PROVISIONS

AMENDMENT VI, Constitution of United States

Rights of accused. -- In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have previously been ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

AMENDMENT XIV, Constitution of United States

Section 1, Citizenship defined - privileges of citizens. -- All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.